Supreme Court, U. S.
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No. 97-1526

In The

Supreme Court of the United States

October Term, 1997

KOICHI MATSUMOTO, *et al.*,

Petitioners,

vs.

JAMES R. GOTCHER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division One

BRIEF IN OPPOSITION FOR RESPONDENTS JAMES R. GOTCHER, AKIKO MURATA AND YUGO TOMITA

DAVID L.S. RICHMOND
Counsel of Record
RICHMOND AND RICHMOND
Attorneys for Respondents James R. Gotcher, Akiko Murata and Yugo Tomita
12555 West Jefferson Boulevard
Suite 218
Los Angeles, California 90066
(310) 821-4272

145696

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

RESTATEMENT OF THE QUESTIONS PRESENTED

1. Do California's statutes, and the court rules duly promulgated thereunder, adequately protect the due process and equal protection rights of civil litigants whose appeals of right are involuntarily dismissed for failure to comply with a court Order.

2. Does a court Rule, promulgated in accordance with the Constitution and statutes of the State of California, which automatically awards costs to a prevailing Respondent, violate the due process and equal protection rights of a losing Appellant despite providing that Appellant with an opportunity to tax costs in a subsequent hearing conducted by the trial court.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

The Petition grossly distorts the background of this case, in rectification of which these Respondents hereby submit a brief description of the underlying action and its appellate history.

In the late Nineteen-Eighties and early Nineteen-Nineties, Congress enacted a series of laws, each designed to confer Permanent Resident Status on aliens who could not otherwise meet the traditional requirements of the *Immigration & Nationality Act of 1952, as amended* [8 U.S.C. §§ 1101, *et seq.*]. The programs thus created were each identified by a unique visa symbol. There were, in sequence, the OP-1, the NP-5, three consecutive AA-1 programs and the on-going DV (or Diversity) programs. Each program was designed to take one of two forms: either a purely random "lottery" or a first-come-first-served registration.

The distinction between these programs was important because, while success in a random lottery reflected solely the luck of the draw, a first-come-first-served program was amenable to certain tactical considerations which could materially increase an applicant's chances of success.[1] For example, something as simple, and as basic, as knowledge o f postal handling procedures — information readily and publicly available in the Domestic Mail Manual — would enable an applicant to know when, where, and how incoming mail was supposed to be handled. With this information in hand, an educated guess could be made as to when, where and how many applications should be mailed to maximize an applicant's chances of success.

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1. The raw odds of any given applicant being registered in the AA-1 program were 1,500:1. In the earlier OP-1 program, Respondent Gotcher succeeded, against those odds, in registering 348 out of 349 clients, using the techniques mentioned herein.

In enacting the AA-1 program, Congress made its intention crystal clear: it explicitly created a first-come-first-served program. The terminology actually used in the statute was quite specific: *"registration in chronological order of receipt."* This was a straight-forward formulation, and all interested parties understood from the beginning that in the AA-1 program Congress had, in fact, created a non-random registration procedure.

As matters turned out, however, affirmative misconduct, committed at the last minute, by two government agencies — the U.S. Postal Service and the State Department — improperly and unexpectedly altered the program; transmuting it from a first-come-first-served registration into a pure lottery. This unauthorized alteration was accomplished by the randomization of applications upon their receipt at the Merrifield, Virginia Post Office; the site designated by the State Department for receipt of registration applications.

At the behest of Congress, the General Accounting Office conducted a formal investigation and reported (GAO/NSIAD-92-166, May 1992) its findings to Congress and to the public. It found that the first AA-1 registration to have been defective, as described immediately above.

Petitioner Koichi Matsumoto was a client of Respondent Coudert Brothers, a New York-based, international law firm with branches in fourteen countries and twenty-one cities. He retained that firm to acquire Permanent Resident status for himself via the first of the three AA-1 Programs. The other Petitioner, Yuki Kobayashi, was never a client of Coudert Brothers.

Respondents James R. Gotcher, Akiko Murata, and Yugo Tomita were employed by Coudert Brothers throughout the

period that Matsumoto was a Coudert Brothers' client. They were employed, respectively, as staff attorney, secretary, and paralegal. Gotcher was never a partner in that firm nor, obviously, were Murata or Tomita.

Due, at least in some significant part, to the government's misconduct, Matsumoto was not registered in the first AA-1 Program.[2] A year later, acting through Kobayashi, he filed what purported to be a representative action. That action accused the Coudert Brothers partnership, along with 123 of its individual partners and former partners, and these three Respondents, of a long list of misdeeds purportedly related to his failure to be registered in that program. His Complaint sought recovery on behalf of a proposed Class of Plaintiffs to be composed of those former Coudert Brothers' clients who had also sought AA-1 registration and failed to receive it.

Having filed his action, he did nothing to prosecute it: he served no defendant, propounded no discovery, and made no motion for class certification. In short, he initiated no action whatsoever. He was completely inert until the trial court issued an Order to Show Cause Re Dismissal for failure to serve the Defendants. In response, Matsumoto had the case transferred to another Department (the Superior Court's "class action" department) on the ground that it was denominated "a class action." Having adroitly side-stepped this obstacle, he then let yet additional 1¾ years go by before he served these Respondents. For all practical purposes, then, the case remained dormant for just short of 2¾ years from the date of filing.

As the three-year, mandatory dismissal deadline approached, Matsumoto reactivated the action by serving these Respondents.

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2. After the randomization of the AA-1 applications, the raw odds of Petitioner Matsumoto being selected for registration rose back to approximately 1,500:1.

Thereafter, he unsuccessfully attempted to serve some of the other defendants. Service on each of those defendants was quashed as being either improper or untimely, or both. In the mean time, these Respondents had moved the trial Court for an Order dismissing the action as to them, in accordance with Sections 583.410 and 583.420(a)(1) of the *California Code of Civil Procedure*. That Motion was grounded upon the fact that Matsumoto's delay was un-excused and that it resulted in substantial harm. These Respondents averred, and the trial court agreed, that their defense was severely impaired, if not irreparably prejudiced, because Matsumoto deprived them of an opportunity to preserve evidence during the almost four year interval between the acts complained of and the date they were served.

Among the crucial matters mentioned by these Respondents was that at the conclusion of the AA-1 program, without the incentive of knowing that a lawsuit had been filed, the Respondents ceased to update their AA-1 client list. That would have become a critical element of their defense because such a list could have identified the particulars of each potential plaintiff's case; an important consideration inasmuch as at least three different retainer agreements were used, each having progressively stronger disclaimers. Furthermore, some clients had withdrawn their authorization for Coudert Brothers to represent them and had received partial or complete refunds; and, finally, Coudert Brothers offered — and some AA-1 clients accepted — to prosecute other forms of "green card" applications at heavily reduced fees. This information would have provided positive defenses for these Respondents.

Matsumoto never disputed the fact that these Respondents were served almost 2¾ years after the complaint was filed. He also never countered the Respondents' detailed recitation of the harm they suffered by virtue of his delay. The trial Court found that Matsumoto's delay in serving the Complaint was tactical

in nature, that the extent of the delay was egregious, and that, in view of the un-contested showing of harm to these Respondents, the excuses proffered by Matsumoto were inadequate. The Court granted the Respondents' Motion and signed an Order dismissing them from the Complaint; whereupon Matsumoto moved the Court to Vacate its Order. That Motion was also denied.

Finally, more than a month after the Complaint was dismissed as to these Respondents, Kobayashi attempted to intervene in this action via a Motion to Join which was predicated upon the purported assignment of a chose-in-action by a putative member of the proposed class. That Motion was denied.

His was never a credible motion because it wholly failed to meet the pleading requirements of a Motion to Join or a Motion to Intervene. Kobayashi used it to deliberately draw a denial, which he duly received, so as to be able to conflate his appeal with that of Matsumoto.[3]

Three appeals were filed in the California Court of Appeal: Matsumoto filed an appeal against his dismissal; Kobayashi filed an appeal against the denial of his Motion to Join; and Kobayashi and Matsumoto filed a joint appeal as to all other interlocutory decisions. Eventually, all these appeals were

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3. This hypothesis is eminently plausible because: (a) Kobayashi moved the California Court of Appeal for an Order consolidating his appeal with that of Matsumoto's (which Motion was denied); and (b) because Kobayashi has acted, de facto, as Matsumoto's attorney-at-law throughout this litigation, while disingenuously claiming to be merely Matsumoto's attorney-in-fact and, thus, able to represent Matsumoto in court in violation of *Drake v. Superior Court* (Div. 1, 4th Dist, 1994) 21 Cal. App. 4th 1826, 26 Cal. Rptr. 829 and Section 6125 of the *California Business & Professions Code*.

dismissed through Motions of the various Respondents on the grounds of the Petitioners' failure to comply with a July 16, 1997 Court Order requiring them, after a seven month delay, to re-designate the record on appeal and perfect the designation. Thereafter, Matsumoto filed a Petition for Review with the California Supreme Court — which was summarily denied for being untimely — and Kobayashi filed a similar Petition, which was also denied.[4]

REASONS FOR DENYING THE WRIT

I.

THE PETITION RAISES NO REAL FEDERAL OR CONSTITUTIONAL ISSUES.

These Respondents' Statement of the Case demonstrates that the bulk, if not the entirety, of the multiple, successive defeats suffered by the Petitioners in the California courts were self-inflicted. They were simply unable or unwilling to meet statutory, administrative, or court-imposed deadlines. As a result, no Respondent was ever required to answer the Complaint. These failures do not raise federal questions.

II.

THE PETITIONERS HAVE RAISED A FALSE CLAIM.

The Petition all but states (Question Presented #2, Petition p. i) that California laws do not permit opportunities to oppose costs awarded to a prevailing Respondent. This is flatly untrue:

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4. The foregoing recitation omits a number of pleadings, principally those associated with Kobayashi's *ad hominem* attacks on the bench officers involved in this case in the trial court and in the Court of Appeal.

and it is known by the Petitioners to be untrue. CRC Rule 26(d) specifically that *"A party may move to have costs taxed . . . as prescribed by rule 870(b)."* Each of the Petitioners has availed himself of this opportunity. They cannot now be heard to claim that they had no opportunity to oppose the award of costs on appeal.

III.

NO FEDERAL QUESTIONS HAVE BEEN DECIDED BY CALIFORNIA COURTS WITH RESPECT TO THESE PETITIONERS' ACTION.

Rule 10 of this Court's Rules provide guide lines for the acceptance of a petition for writ of certiorari. Subdivision (a) does not apply because this matter has never been before a United States court; subdivision (b) does not apply because the California Supreme Court has entered no decision in this matter except to deny review of the appellate decisions; and subdivision (c) does not apply because no California court involved in the Petitioners' proceedings has *". . . decided an important question of federal law that has not been, but should be settled, by this court . . ."*

IV.

THE PETITIONERS ARE BOUND BY THE LAW OF THE FORUM OF THEIR CHOICE.

The Petitioners assert (Petition, p. 2) that the proposed Plaintiff "class" consisted of Japanese aliens. Leaving aside the issue of the non-Japanese aliens who were potential class members,[5] the putative

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5. The potential class consisted of nationals of 22 countries. Although Kobayashi and Matsumoto had pretensions to represent the putative class, Kobayashi totally ignored the non-Japanese members of this potential class.

class, as a whole, consisted of non-resident aliens, thus providing complete diversity; and the amount in controversy well exceeded Ten Thousand Dollars. Therefore, the Petitioners might well have availed themselves of a forum in the United States District Court under the provisions of 28 U.S.C. § 1332(a). They chose not to do so.

Thus, it was their tactical choice that resulted in the application of California's statutes and rules of procedure.

Under the *Tenth Amendment* to the United States Constitution, the states are free to establish their own constitutions and enact laws thereunder.

In California, a Judicial Council was established pursuant to the provisions of *article VI, section 6 of the Constitution of California*, and was given various powers and responsibilities for the express purpose of improving the administration of justice. Each Rule of the *California Rules of Court* (CRC) was adopted by the Judicial Council under its constitutional authority to

> *. . . survey judicial business and make recommendations to the courts . . . adopt rules for court administration, practice and procedure, not inconsistent with statute, and perform other functions prescribed by statute . . .*

The constitutionality of the California Rules on the subject of appeals has been examined and held to be a valid exercise of the authority of the judicial council to adopt rules governing appellate procedure [Calif. Const. Art. 6, § 6, & *Millsap v. Hooper,* 34 Cal. 2d 192, 195, 208 P.2d 982 (1949)].

The rule [CRC 26(a)] which provides that a prevailing party is entitled to his costs as an incident to the judgment on appeal

is not unconstitutional. *See Harmon v. Pacific Tel. & Tel. Co.*, 201 Cal. App. 2d 453, 457, 20 Cal. Rptr. 118 (1962) to the effect that

> The contention that rule 26 is unconstitutional is likewise without merit. Pertinent is the following from *Rosenfield v. Vosper, supra*, 57 Cal. App. 2d 605, 610-611: "[H]is contention here overlooks the nature of costs. They are not a penalty imposed on the losing party for his misconduct: They are in the nature of incidental damages allowed to indemnify a party against the expense of successfully asserting his rights in court. [citations omitted] Costs are a part of the burden of litigation, and no litigant is deprived of a constitutional right by statutes which impose such costs upon him." [citations omitted].

V.

THIS PETITION IS FRIVOLOUS.

The trial court was convinced, based upon uncontradicted evidence, that this lawsuit was being prosecuted by Petitioner Kobayashi, and that Matsumoto was nothing more than his catspaw. Indeed, the evidentiary record in the trial court shows that Petitioner Kobayashi was using the underlying law suit as a tool in a vendetta against these Respondents. That record further shows that his fervor in pursuing this matter beyond all rationality results from his espousal of a highly unsavory racial theory which he and a tiny band of like-minded adherents seek to impose on others. The underlying action was without merit. Each of the various appeals was without merit, and this Petition is without merit.

CONCLUSION

For the reasons given above, the Petition should be denied.

Respectfully submitted,

DAVID L.S. RICHMOND
Counsel of Record
RICHMOND AND RICHMOND
Attorneys for Respondents
James R. Gotcher, Akiko Murata
and Yugo Tomita
12555 West Jefferson Boulevard
Suite 218
Los Angeles, California 90066
(310) 821-4272